85-1479

Supreme Court, U.S.
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CLERK

No. .....

In The
Supreme Court of the United States
October Term, 1985

—o—

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

v.

DONALD LINDLEY and RITA LINDLEY,
Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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March 6, 1986

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QUESTION PRESENTED

In this diversity case, both the district court and the court of appeals concluded that, as a matter of law, Fed. R. Civ. P. 15(c) did not permit relation back of an amendment to the complaint adding a defendant after the limitations period expired. State "Doe" pleading procedures would render the amendment timely in state court. The state procedures are not part of the statute of limitations, do not refer to it, and are described by the state's courts in terms of relation back rather than extension of the limitations period. In these circumstances, do *Hanna v. Plumer*, 380 U.S. 460 (1965) and *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) permit a federal court to apply the state procedures instead of the Federal Rule, on the rationale that they "effectively" extend the length of the limitations period?

RULE 28.1 STATEMENT

Petitioner Stone & Webster Engineering Corporation is wholly-owned by Stone & Webster, Inc. Petitioner has the following subsidiaries (other than wholly-owned subsidiaries):

Rockton Associates, Incorporated (Delaware)
Stone & Webster Construction Company, Inc. (Delaware)
Stone & Webster Libya Corporation (Delaware)
Stone & Webster Michigan, Inc. (Michigan)
Stone & Webster Power Projects Corporation (Delaware)
Stone & Webster Worldwide Engineering Corporation (Delaware)
3 Executive Campus Corporation (Delaware)
245 Summer Street Corporation (Massachusetts)

Petitioner is affiliated with the following wholly-owned subsidiaries of Stone & Webster, Inc., and their listed subsidiaries:

Stone & Webster Overseas Group, Inc. (Delaware)
- Associated Engineers & Consultants, Inc. (New York)
- Rockton Technical Services Corporation (Delaware)
- Stone & Webster Abu Dhabi (United Arab Emirates), Inc. (Delaware)
- Stone & Webster Arabia, Incorporated (Delaware)
- Stone & Webster of Argentina Corporation (Delaware)
- Stone & Webster Asia Corporation (Delaware)

Stone & Webster Atlantic Corporation (Delaware)
Stone & Webster Australia Corporation (Delaware)
Stone & Webster Bharat, Incorporated (Delaware)
Stone & Webster Dominican Republic, Incorporated (Delaware)
Stone & Webster Engineering Pty. Limited (Australia)
Stone & Webster Engineering S.A.R.L. (France)
Stone & Webster Engineering Services, Incorporated (Delaware)
Stone & Webster Espana, Incorporated (Delaware)
Stone & Webster Far East Technical Services Corp. (Delaware)
Stone & Webster Group Limited (England)
- Seaflo Systems Limited (England)
- Sea Floor & Floating Production Systems Limited (England)
- Stone & Webster Construction Limited (England)
- Stone & Webster Engineering Limited (England)
  - Stone & Webster Services Limited (England)
- Stone & Webster Engineering and Field Services Limited (England)
- Stone & Webster United Arab Emirates Limited (England)

Stone & Webster Indonesia Corporation (Delaware)
Stone & Webster Inter-American Corporation (Delaware)
Stone & Webster International Corporation (Delaware)

Stone & Webster International Projects Corporation (Delaware)
Stone & Webster Italia, Incorporated (Delaware)
Stone & Webster Jamaica, Incorporated (Delaware)
Stone & Webster Korea Corporation (Delaware)
Stone & Webster Kuwait, Incorporated (Delaware)
Stone & Webster Malaysia Corporation (Delaware)
Stone & Webster of Mexico Engineering Corporation (Delaware)
Stone & Webster Middle East Engineering Services Corporation (Delaware)
Stone & Webster Pacific Corporation (Delaware)
Stone & Webster Pakistan Corporation (Delaware)
Stone & Webster Power Engineering Corporation (Delaware)
Stone & Webster Puerto Rico, Incorporated (Delaware)
Stone & Webster Saudi Arabia, Incorporated (Delaware)
Stone & Webster Technology Corporation (Delaware)
Stone & Webster Turkey Corporation (Delaware)
Stone & Webster Venezuela, Incorporated (Delaware)
Stone & Webster Management Consultants, Inc. (New York)
Stone & Webster Appraisal Corporation (Massachusetts)
Stone & Webster Management Services Limited (Bermuda)
Stone & Webster Overseas Consultants Inc. (Delaware)

Stone & Webster Service Pty. Limited (Australia)
Stone & Webster Canada Limited (Canada)
CECO Consultants Limited (Canada)
Seaflo Systems Canada Ltd. (Canada)
Stone & Webster Computer Leasing Corporation (Delaware)
Commercial Cold Storage, Inc. (Georgia)
Stone & Webster Oil Company, Inc. (Texas)
Saw Drilling, Inc. (Texas)
Sabal Corporation (Florida)
Coconut Palm Corporation (Florida)
King Palm Corporation (Florida)
Princess Palm Corporation (Florida)
Queen Palm Corporation (Florida)
Sabal Realty Management Corporation (Florida)
San Salvador Development Corporation (Texas)
Sleeper Street Realty Corporation (Delaware)
Spruce Mills Production Company, Inc. (Delaware)
Summer Street Realty Corporation (Massachusetts)
3 Executive Campus Realty, Inc. (Delaware)

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DONALD LINDLEY and RITA LINDLEY,
Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

Petitioner Stone & Webster Engineering Corporation ("Stone & Webster") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 14, 1986.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported; it is reproduced as Appendix A. The District Court's opinions are unreported; its opinions and orders of September 14, 1983, January 19, 1984, and January 23, 1984, are reproduced as Appendices B, C, and D, respectively.

—o—

JURISDICTION

The Court of Appeals' judgment was entered on January 14, 1986. This Petition is filed within 90 days of that date. The Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 15(c):

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the in-

stitution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. . . .

California Code of Civil Procedure section 474 (West 1979):

> § 474. Defendant designated by fictitious name; amendment; requirements for default judgment; notice to person served
>
> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

California Code of Civil Procedure section 581a(a) (West 1982) (repealed 1984 and replaced by Cal. Civ. Proc. Code section 583.210 (West. Supp. 1985)):

> § 581a. Dismissal; lack of prosecution; effect of motion as appearance
>
> (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

—o—

STATEMENT OF THE CASE

Respondent Donald Lindley was injured in an industrial accident on September 9, 1981. He and his wife ("plaintiffs") filed suit in California state court on August 31, 1982, against General Electric Corporation and ten "Does." (Ninth Circuit Excerpts of Record 1, p. 1; CR 38, Exh. A) Plaintiffs amended the complaint on October 19, 1982, adding a defendant. (CR 1, p. 4) The case was then removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441. (CR 1) The district court's jurisdiction

was based on diversity of citizenship, 28 U.S.C. § 1332(a). (CR 1, pp. 1-2)

California has a one-year statute of limitations for personal injury actions. Cal. Civ. Proc. Code § 340(3). On December 3, 1982, after the expiration of that period, plaintiffs moved, "pursuant to Rule 15(a) of the Federal Rules of Civil Procedure," to amend the complaint to add petitioner Stone & Webster Engineering Corporation ("Stone & Webster") as "an additional party defendant." (CR 10) The district court granted the motion. (CR 24) Plaintiffs filed their second amended complaint first naming Stone & Webster as a defendant on March 1, 1983. (CR 25) They served the complaint on Stone & Webster in April, 1983. Prior to service, Stone & Webster did not have notice either of the pendency of plaintiffs' action or of the incident upon which it was based.

Stone & Webster moved to dismiss pursuant to Fed. R. Civ. P. 12(b) (6) on the ground that plaintiffs' claims against it were barred by the one-year statute of limitations. (CR 36) Plaintiffs contended that their claims were not time-barred, arguing that California state procedure respecting "Doe" defendants, not Fed. R. Civ. P. 15(c), governed the addition of new parties. (CR 56) The district court ruled that Rule 15(c), not state provisions, governed the motion and allowed plaintiffs a further opportunity to brief the effect of that Rule. (App. B, CR 72) Following that briefing, the district court granted Stone & Webster's motion. (App. C, D; CR 89, 91)

The Ninth Circuit reversed. It acknowledged that "if Rule 15(c) applies, the district court was correct in holding that plaintiffs' action against Stone & Webster

was time barred. . . ." (App. A at A4) However, it held that Fed. R. Civ. P. 15(c) did not apply. Instead, it held applicable the relation back rule applied in California state courts.

The Ninth Circuit reached that result by combining the California statute permitting suit against fictitiously-named "Doe" defendants (Cal. Civ. Proc. Code § 474), with the California statute requiring dismissal of a state court action if a summons is not served and returned within three years (former Cal. Civ. Proc. Code § 581a(a)). It read those procedural statutes as "effectively extend[ing] the one-year statute of limitations three years past the commencement of the action as to defendants named as Does." (App. A at A5) (footnote omitted.) The Ninth Circuit then treated plaintiffs' motion to amend under Fed. R. Civ. P. 15(a) as a motion to substitute Stone & Webster for a "Doe," and held plaintiffs' amendment timely under the "three-year extension" of the statute of limitations it had created.

The Ninth Circuit rejected the idea that Fed. R. Civ. P. 15(c) should be applied under *Hanna v. Plumer,* 380 U.S. 460 (1965). It reasoned that because Cal. Civ. Proc. Code section 474 permits Doe pleading in state court and because former section 581a(a) allows three years in which to serve summons, those two sections together, along with the one-year limitations statute itself, provide " 'the functional equivalent of a limitations period of up to four years.' " (App. A at A5-A6) (*quoting Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294, 297 (C.D. Cal. 1976))[1]

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[1] The Ninth Circuit's decision "adopt[ed] *Rumberg* as the law of the Circuit." (App. A at A7)

The Ninth Circuit saw no conflict between Rule 15(c) and that California limitations "scheme," because unlike that "scheme," Rule 15(c) concerns relation back and does not purport to define the length of the limitations period. Citing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), it therefore concluded that *Hanna* did not require it to apply Rule 15(c) to plaintiffs' amendment adding Stone & Webster as a defendant. (App. A at A8-A9)

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S REFUSAL TO APPLY RULE 15(c) TO BAR PLAINTIFFS' CLAIM AGAINST STONE & WEBSTER IS CONTRARY TO HANNA v. PLUMER, IS AN UNWARRANTED EXTENSION OF WALKER v. ARMCO STEEL CORP., AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

A. The Ninth Circuit's Refusal to Apply Rule 15(c) Is Contrary to Hanna v. Plumer.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court concluded that when a situation is covered by one of the Federal Rules, the Federal Rule governs, even if it would produce a result different from that under state procedures. As the Court explained, the federal courts have "been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the

Rule in question trangresses neither the terms of the [Rules] Enabling Act [28 U.S.C. § 2072] nor constitutional restrictions." 380 U.S. at 471 (footnote omitted).

This case presents such a situation. Under Fed. R. Civ. P. 15(c), plaintiffs' amendment adding Stone & Webster as a defendant could not relate back, because Stone & Webster did not have notice of the action within the limitations period and neither knew nor should have known that, but for a mistake concerning identity, plaintiffs would have sued it. The Ninth Circuit conceded that under Rule 15(c) plaintiffs' claims against Stone & Webster were time-barred. (App. A at A4) It found plaintiffs' claims against Stone & Webster timely solely on the basis of California procedures under which a different result obtained. It ruled that plaintiffs had complied with California procedures to substitute Stone & Webster for a Doe defendant[2] and that under the state procedure, which does not require notice within the limitations period, the amendment was timely. (App. A at A9-A10)

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[2] In fact, they did not even pretend to comply with the California procedures. Plaintiffs' motion to amend was not one to substitute Stone & Webster for a Doe, but as their notice of motion stated, to join it as "an additional party defendant." (CR 10, p. 2). As the Ninth Circuit has explained elsewhere, under California law, if a defendant is added to an amended complaint as a new defendant, rather than substituted for a Doe, the amendment does not relate back. *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 683 (9th Cir. 1980); *see also Union Tank & Pipe Co. v. Mammoth Oil Co.*, 134 Cal. App. 229, 232, 25 P.2d 262, 263 (1933). The Ninth Circuit's remark that plaintiffs "stated in their 'Amended Memorandum of Points and Authorities re Motion to Add Party Defendants' that the parties were added in lieu of the Doe designation" (App. A at A9-A10) is inexplicable. No such statement, or anything like it, appears in that memorandum (CR 16) or any of plaintiffs' other moving papers in the district court.

The Ninth Circuit did not even intimate, much less reach a reasoned decision, that Federal Rule 15(c) transgresses the terms of the Enabling Act or the Constitution. To the contrary, it has previously squarely held that Rule 15(c) does not. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 740 (9th Cir. 1982). Under *Hanna*, therefore, the district court was required to apply the Federal Rules in this action to bar plaintiffs' amendment adding Stone & Webster.

B. Walker v. Armco Steel Corp. Does Not Support the Ninth Circuit's Decision.

The Ninth Circuit recognized *Hanna* as controlling authority, but said it did not apply. (App. A at A8-A9) It reasoned that California's rule for Doe defendants was not a relation back rule corresponding to Fed. R. Civ. P. 15(c), but a substantive part of each of California's statutes of limitations. Referring to *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), it applied the California rule to the amendment adding Stone & Webster as a defendant.

Walker and its predecessor, *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949), both involved state statutes providing that service of summons was the event that commenced an action " 'within the meaning of' " the limitations statute. Okla. Stat. tit. 12, § 97 (1971), *quoted at* 446 U.S. at 743 n.4; Kans. Gen. Stat. § 60-308 (1935), *quoted at* 446 U.S. at 746. Both statutes were plainly "part and parcel of the statute of limitations." 446 U.S. at 752 (footnote omitted). There was no conflicting Federal Rule directly on point in those cases because, though Fed. R. Civ. P. 3 states that a civil action is commenced by filing a complaint, there is "no

indication" that the Rule was intended to affect the statute of limitations; rather it addresses the starting point for later events in the action. 446 U.S. at 750-51. Thus *Walker* simply holds that in diversity cases "*in the absence of a Federal Rule directly on point*, state service requirements *which are an integral part of the state statute of limitations* should control . . . ." 446 U.S. at 752 (emphasis added)

This is a very different case. Here, Cal. Civ. Proc. Code section 474 and former section 581a(a), the two provisions the Ninth Circuit relied on, are not "part and parcel" of the California statute of limitations at all, but procedural laws with direct counterparts in the Federal Rules.

Section 474

Unlike the statutes in *Walker* and *Ragan*, Cal. Civ. Proc. Code section 474, the Doe defendant statute, makes no express reference to the statute of limitations and is found in an entirely different title of the Code. It does not control when someone must bring an action for limitations purposes; its provisions come into play only after an action is filed. California cases applying it to amendments adding defendants make it plain that it is California's statutory formulation of conditions for the "relation-back" of amendments adding parties. *See Marasco v. Wadsworth*, 21 Cal. 3d 82, 85, 145 Cal. Rptr. 843, 844, 578 P.2d 90, 91 (1978) ("The question before us is whether the amendment substituting Wadsworth as a named defendant [in place of Doe IX] relates back to the filing date of the original complaint . . . ."); *Smeltzley v. Nicholson Manufacturing Co.*, 18 Cal. 3d 932, 934, 136 Cal Rptr. 269, 270, 559 P.2d 624, 625 (1977); *Barrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 9, 192 Cal. Rptr. 380, 384 (1983)

("Under California's Doe defendant practice, a new defendant may be added by amendment long after the original statute of limitations has expired, because the amendment is deemed to relate back to the filing of the original complaint.")

As a relation-back provision, section 474 performs exactly the same procedural function as Rule 15(c), though its conditions for relation back are different. In previous decisions, the Ninth Circuit has expressly recognized that fact. *Craig v. United States*, 413 F.2d 854, 856 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969):

> "The only purpose the naming of fictitious defendants could possibly serve is to make it possible to substitute named defendants after the statute of limitations has run. But Rule 15(c), Federal Rules of Civil Procedure, provides the only way in which defendants, not accurately named in a pleading before the limitation period has run, may be accurately named afterwards."

In contrast to the California law and its own decision in *Craig*, the Ninth Circuit here adopted the statement in *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294 (C.D. Cal. 1976) that section 474, in conjunction with section 581a(a), "does not deal with the 'relation back' doctrine at all but rather extends or tolls the limitations period." (App. A at A9) (*quoting* 424 F. Supp. at 300). *Craig* and the California cases cited above show that is exactly wrong. Indeed, the only California case that has ever even loosely referred to section 474 as "extending" the limitations period did so only in passing and cited only to *Rumberg*. *Munoz v. Purdy*, 91 Cal. App. 3d 942, 946, 154 Cal. Rptr. 472, 474 (1979). (*Rumberg* itself cited no authority, California or federal, for its characterization.) The Cali-

fornia Supreme Court and court of appeal have since referred to the *Munoz* case itself as one concerning relation back. *Barrington v. A.H. Robins Co.*, 39 Cal. 3d 146, 153, 216 Cal. Rptr. 405, 409, 702 P.2d 563, 567 (1985); *Nelson v. A.H. Robins Co.*, 149 Cal. App. 3d 862, 866, 197 Cal. Rptr. 179, 181 (1983).

Section 581a

Similarly, section 581a is not "part and parcel" of the statute of limitations, and it also conflicts with a Federal Rule directly on point. Again, unlike the statutes in *Walker* and *Ragan*, section 581a makes no express reference to the statute of limitations and is found in a different title from the limitations statutes. In fact, California courts have "expressly held that Section 581a is not a statute of limitations." *Rio Del Mar Country Club, Inc. v. Superior Court*, 84 Cal. App. 2d 214, 221, 190 P.2d 295, 300 (1948); *accord*: *Gonsalves v. Bank of America*, 16 Cal. 2d 169, 172, 105 P.2d 118, 120 (1940). Is is "merely a matter of procedure." *People v. Kings County Development Co.*, 48 Cal. App. 72, 77, 191 P. 1004, 1006 (1920); *accord*: *Atchison, T. & S.F. Railway v. Rollaway Window Screen Co.*, 101 Cal. App. 2d 763, 765-66, 226 P.2d 763, 765-66 (1951) (applying section 581a as a rule of procedure in an action governed by federal substantive law).

Section 581a provides generally for involuntary dismissal for specified failures to prosecute. "Revised Recommendation Relating to Dismissal for Lack of Prosecution," 17 Cal. Law Revision Comm'n Reports 905, 909 (1984); 6 B. Witkin, *California Procedure*, Proceedings Without Trial § 87 (3d ed. 1985). In general, therefore, it corresponds to Fed. R. Civ. P. 41(b). Subparagraph (a) of section 581a, on which the Ninth Circuit particularly re-

lied, provides for involuntary dismissal (without prejudice) if summons is not served and returned in three years. That particular provision corresponds exactly to Fed. R. Civ. P. 4(j), which requires dismissal if summons is not served within 120 days, absent a showing of good cause.

In short, this is not a situation in which a state rule is "part and parcel" of the statute of limitations and has no Federal Rules counterpart. Instead, the two California statutes on which the Ninth Circuit relied come into play only after an action is filed, and their subject matter—relation back and diligent service of summons—is directly covered by Federal Rules. As a result, *Walker* has no application here.

C. The Ninth Circuit's Refusal to Apply Rule 15(c) Is Contrary to Decisions of Other Circuits.

Numerous diversity cases since *Hanna* have dealt with the timeliness of amendments adding defendants where Rule 15(c) and state rules would produce different results. In all of them, the state rules could have been characterized as "effectively" altering the limitations period with at least as much basis as the Ninth Circuit had in this case. Those cases did not do that. Instead, they correctly held that Rule 15(c)'s express treatment of the issue controlled. The Ninth Circuit's decision is in conflict with those cases.

Many cases, following *Hanna*, have applied Rule 15(c) where it permitted a new defendant to be added when the state relation back rule would have barred the amendment. *E.g., Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 610-12

(4th Cir.), *cert. dismissed,* 448 U.S. 911 (1980); *Welch v. Louisiana Power & Light Co.,* 466 F.2d 1344, 1345-46 (5th Cir. 1972); *Loudenslager v. Teeple,* 466 F.2d 249, 250 (3d Cir. 1972); *Crowder v. Gordons Transports, Inc.,* 387 F.2d 413, 415-16 (8th Cir. 1967).[3] Since statutes of limitations benefit defendants, not plaintiffs, there was at least as much reason in those cases as the Ninth Circuit had here to treat the state relation back rules favoring defendants as "part and parcel" of the limitations scheme. The Ninth Circuit's decision is contrary to their refusal to do that.

Even more directly on point, Rule 15(c) has also been applied when it barred an amendment that would have related back under state law. *Britt v. Arvanitis,* 590 F.2d 57, 61-62 (3d Cir. 1978); *accord*: *Royal Indemnity Co. v. Petrozzino,* 598 F.2d 816, 820 (3d Cir. 1979); *Williams v. Avis Transport of Canada, Ltd.,* 57 F.R.D. 53 (D. Nev. 1972); *see also Simmons v. Fenton,* 480 F.2d 133 (7th Cir. 1973) (Rule 15(c), requiring notice, barred amendment adding new defendant, though Illinois law turning on filing of complaint would apparently allow it). The Ninth Circuit's decision cannot be squared with those cases.[4]

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[3] The Ninth Circuit itself has applied Rule 15(c) to permit an amendment to relate back that state law would have barred, though the amendment did not involve addition of a defendant. *Santana v. Holiday Inns, Inc.,* 686 F.2d 736, 740 (9th Cir. 1982).

[4] Nor can the First Circuit's decision in *Marshall v. Mulrenin,* 508 F.2d 39 (1st Cir. 1974). It held that a Massachusetts amendment provision, "although cast in procedural terms, has a direct substantive effect," 508 F.2d at 44, and sustained an amendment that it permitted but Rule 15(c) would have barred. The Ninth Circuit, though noting *Marshall,* did not rely on it. (App. A at A7 n. 7).

In short, the Ninth Circuit's decision in this case is in conflict with this Court's decision in *Hanna v. Plumer*, cannot be justified by *Walker v. Armco Steel Corp.*, and conflicts with decisions in other circuits that have adhered to *Hanna*. It should be reviewed to bring Ninth Circuit law into conformity with this Court's *Hanna* decision and the law in other circuits.

II. THE NINTH CIRCUIT'S DECISION POSES A SERIOUS THREAT TO THE FEDERAL RULES' GOAL OF UNIFORM PROCEDURE.

The Federal Rules of Civil Procedure were meant to " 'bring about uniformity in the federal courts by getting away from local rules.' " *Hanna*, 380 U.S. at 472 (*quoting Lumbermen's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)). The Ninth Circuit's decision poses a serious threat to that purpose.

First, it threatens uniformity because at least twenty-eight states provide in some manner for suit against fictitiously designated "Doe" defendants.[5] The conditions

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[5] *See* Cal. Civ. Proc. Code § 474 (West 1979); Ga. Code Ann. § 81A-110(a) (1984); Me. Rev. Stat. Ann. tit. 14, § 651 (1980); Mass. Ann. Laws ch. 223, § 19 (Law. Co-op. Supp. 1985); Miss. Code Ann. § 11-7-39 (1972); Mont. Code Ann. § 25-5-103 (1985); Neb. Rev. Stat. § 25-321 (Supp. 1984); N.H. Rev. Stat. Ann. § 509:7 (1983); N.J. Civ. Prac. R. 4:26-4; N.M. Stat. Ann. § 38-2-6 (1984); N.Y. Civ. Prac. Law § 1024 (McKinney 1976); N.C. Gen. Stat. § 1-166 (Michie 1983); R.I. Gen. Laws § 9-5-20 (1985); S.C. Code Ann. § 15-13-70 (Law. Co-op. 1977); S.D. Codified Laws Ann. § 15-6-9(h) (1984); Ala. R. Civ. P. 9(h); Ariz. R. Civ. P. 10(f); Colo. R. Civ. P. 10(a); Hawaii R. Civ. P. 17(d); Idaho R. Civ. P. 10(a)(4); Ind. R. Trial P. 17(F); Ky. R. Civ. P. 4.15; Minn. R. Civ. P. 9.08; Nev. R. Civ. P. 10(a); N.D. R. Civ. P. 9(h); Ohio R. Civ. P. 15(d); Or. R. Civ. P. 20(H); Utah R. Civ. P. 9(a)(2); Wash. R. Civ. P. 10(a)(2).

for and relation back effect of naming a "Doe" defendant vary considerably from state to state.[6] The Ninth Circuit's decision, if permitted to stand, would introduce into the federal courts those variations among state provisions on Doe pleading, and on the conditions for relation back, in place of the uniform rule stated in Rule 15(c).

More subtly but more seriously, the Ninth Circuit's decision is a threat to the Federal Rules' goal of uniformity because of its rationale. In an end run around *Hanna*, the Ninth Circuit engrafted California procedural provisions onto the statute of limitations, and then treated them as substantive law to be applied in place of a Federal Rule on the same subject. It did that because of its perception that they were part of California's limitations "scheme," presumably because they "effectively" modified results under the statute. But there is no clear end to that process of reasoning. Myriad other state procedures can likewise

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[6] For example, Alabama and New York permit Doe pleading and relation back where the defendant's identity is not known, but not, like California, where his identity is known but the existence of a cause of action against him is not. *Threadgill v. Birmingham Board of Ed.*, 407 So. 2d 129, 132 (Ala. 1981); *Matthews v. Schusheim*, 42 Misc. 2d 176, 247 N.Y.S.2d 285, 286 (1964); *compare Marasco v. Wadsworth*, 21 Cal. 3d 82, 88, 145 Cal. Rptr. 843, 846, 578 P.2d 90, 93 (1978); *Garrett v. Crown Coach Corp.*, 259 Cal. App. 2d 647, 650, 66 Cal. Rptr. 590, 592 (1968). Arizona, unlike California, appears not to permit Doe pleading where the defendants' name is unknown but can be obtained by some inquiry or resort to information that is easily accessible. *Gonzalez v. Tidelands Motor Hotel Co.*, 123 Ariz. 217, 598 P.2d 1036, 1037 (App. 1979); *compare Munoz v. Purdy*, 91 Cal. App. 3d 942, 947, 154 Cal. Rptr. 472, 475 (1979). Nevada, unlike California, requires that the plaintiff have some particular person in mind and does not permit suit against Does whose existence is purely speculative (like Stone & Webster's here). *Knight v. Witco Chem. Co.*, 89 Nev. 586, 517 P.2d 792, 793 (1973); *compare Garrett v. Crown Coach Corp.*, 259 Cal. App. 2d 647, 651-52, 66 Cal. Rptr. 590, 593-94 (1968); *Day v. Western Loan & Bldg. Co.*, 42 Cal. App. 2d 226, 236, 108 P.2d 702, 707 (1940).

be viewed as parts of state substantive law "schemes" because they "effectively" add to or subtract from the results that would follow from the basic substantive statutes.

For example, as discussed in *Walker* and *Ragan*, the Oklahoma and Kansas statutes of limitations are tolled by service of summons. Obviously, in suits in state courts, service of summons must be accomplished by the methods specified in those states' procedural laws. If the states' specified methods of service differ from those in the Federal Rules, the Ninth Circuit's rationale would treat those state procedures as "effectively" part of substantive limitations law and require them to be followed in federal diversity actions in order to toll the statute. And the problem would not end there; the Ninth Circuit's reasoning could easily be extended to other substantive statutes and procedural rules.

This Court should review the Ninth Circuit's decision because of the serious threat its result and rationale pose for uniform procedure under the Federal Rules.

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CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 6, 1986

APPENDIX A

COURT OF APPEALS' OPINION

Filed January 14, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1582

DC No. C-82-6195 WAI

DONALD LINDLEY and RITA LINDLEY,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC COMPANY, etc.,

Defendants,

and

STONE & WEBSTER ENGINEERING CORPORATION,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued & Submitted January 15, 1985—
San Francisco, California

Before: FLETCHER, BOOCHEVER, and NORRIS,
Circuit Judges.

NORRIS, Circuit Judge:

Plaintiffs Donald and Rita Lindley filed this personal injury action in California state court within one year as required by the applicable California statute of limitations.

Cal. Civ. Proc. Code § 340(3) (West Supp. 1985). After the case was removed to federal court on the basis of diversity jurisdiction by defendant General Electric Company, plaintiffs were granted leave to amend their complaint to add Stone and Webster Engineering Corporation (Stone & Webster) as a defendant. Stone & Webster was not served until after expiration of the one-year limitation period.

The district court dismissed the action against Stone & Webster on the ground that it was time-barred. The court applied Federal Rule of Civil Procedure 15(c) and held that the amendment adding Stone & Webster as a defendant did not relate back to the date of the original complaint because Stone & Webster did not receive notice of the action within the one-year limitation period.[1]

Plaintiffs appeal on the ground that their claim against Stone & Webster is not time-barred because California law regarding the naming of Doe defendants, not

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[1] Rule 15(c) provides in pertinent part as follows:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 15(c), governs.[2] Under California law, a plaintiff who names a Doe defendant in his complaint and alleges that the defendant's true name is unknown has three years from the commencement of the action in which to discover the identity of the Doe defendant, to amend the complaint accordingly, and to effect service of the complaint. Cal. Civ. Proc. Code §§ 474, 581a (West 1982).[3] *See Munoz*

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[2] The district court's dismissal of the action against only defendant Stone & Webster is appealable under 28 U.S.C. § 1291 (1982) because the district court entered final judgment in favor of Stone & Webster in compliance with the requirements of Fed. R. Civ. P. 54(b).

[3] Section 474 reads in pertinent part as follows:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)."

When plaintiffs commenced the instant action in state court, the relevant provision was Cal. Civ. Proc. Code § 581a (West 1982) (repealed 1984), which provided as follows:

> (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any

(Continued on following page)

v. Purdy, 91 Cal. App. 3d 942, 946, 154 Cal. Rptr. 472, 474 (1979). When a defendant is brought in by amendment substituting his name for a Doe defendant, he "is considered a party to the action from its commencement for purposes of the statute of limitations." *Barrows v. American Motors Corp.,* 144 Cal. App. 3d 1, 7, 192 Cal. Rptr. 380, 382 (1983).

Unlike Rule 15(c), section 474 has no requirement that the newly named defendant have notice of the institution of the action within the time provided for commencement of the action. Plaintiffs claim they satisfied the requirements of sections 474 and 581a by naming Doe defendants in their original complaint, amending the complaint after removal to federal court to name Stone & Webster as a defendant, and serving Stone & Webster within three years from the commencement of the action.

Thus, if Rule 15(c) applies, the district court was correct in holding that plaintiffs' action against Stone & Webster was time-barred because Stone & Webster did not have notice of the institution of the action within the one-year statutory period. But if California law applies, the

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(Continued from previous page)

> party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

This section has since been repealed, but a virtually identical provision has been enacted as Cal. Civ. Proc. Code § 583.210 (West Supp. 1985).

action is not time-barred because of the three-year extension of time for naming and serving Stone & Webster.

Hence we must decide whether under these circumstances Rule 15(c) or California law applies.[4] Although we find no Ninth Circuit authority on point, the question was squarely addressed in *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294 (C.D. Cal. 1976) (Pregerson, J.). In *Rumberg*, the district court granted plaintiff leave to amend her complaint to add new defendants after the expiration of the one-year statute of limitations. Judge Pregerson ruled that Rule 15(c) was inapplicable because California law effectively extended the one-year statute of limitations three years past the commencement of the action as to defendants named as Does.[5] He reasoned as follows:

> Taken together, CCP §§ 340(3), 474, and 581a can, depending on the date the complaint is filed, provide the

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[4] We review *de novo* the district court's dismissal of the action against Stone & Webster under Fed. R. Civ. P. 12(b)(6). *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983).

[5] Arguing that we should not follow *Rumberg*, Stone & Webster cites several California cases that characterize Cal. Civ. Proc. Code § 581a (now § 583.210) as merely procedural. *See, e.g., Gonsalves v. Bank of America National Trust & Savings Ass'n*, 16 Cal. 2d 169, 172, 105 P.2d 118, 120 (1940). In other cases, California courts have used the phrase "relates back" in analyzing the Doe scheme. But in resolving choice of law questions, we look to applications, not labels. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us.") Moreover, *Rumberg* has been cited favorably by the California Court of Appeal. *Munoz v. Purdy*, 91 Cal. App. 3d 942, 946, 154 Cal. Rptr. 472, 474 (1979).

> functional equivalent of a limitations period of up to four years. For such a limitations period to apply two conditions must be met: (1) The plaintiff must file suit within one year of the accrual of the cause of action, and (2) the plaintiff must be unaware of the identity of certain defendants when the complaint is filed.

Id. at 297.

Because the action was not time-barred under California's substantive statute of limitations, Judge Pregerson concluded that Rule 15(c) did not come into play. The limited purpose of Rule 15(c), he observed, was to "provide a uniform solution to statute of limitations problems when amendments are sought *after* the limitations period has expired; [the rule] was not designed to determine the *length* of the limitations period to be applied." *Id.* at 301 (emphasis in original). Hence, because the plaintiff filed and served the amended complaint within the state limitations period, there was no conflict with Rule 15(c).[6]

We find Judge Pregerson's analysis in *Rumberg* to be persuasive, as do the commentators. *See* 19 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 4509, at 158-59 (1982) (discussing *Rumberg* with approval); Hogan, *California's Unique Doe Defendant Practice:*

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[6] The plaintiff in *Rumberg* brought two separate actions on the same claim, one in state and one in federal court. She named a fictitious defendant in the state court action, but did not do so in federal court. Judge Pregerson held, as an alternative ground for his decision, that the substitution of the defendant for a fictitious defendant in the state action in compliance with California Doe practice had the effect of tolling the statute of limitations in the federal action under the doctrine of equitable tolling. *Rumberg*, 424 F. Supp. at 299-300. This theory is unavailable to the Lindleys because they did not join Stone & Webster in state court, but did so in federal court after removal.

A Fiction Stranger Than Truth, 30 Stan. L. Rev. 51, 113-14 (1977) (endorsing Judge Pregerson's "penetrating and insightful opinion on the Doe defendant practice"). Accordingly, we adopt *Rumberg* as the law of the circuit.[7] In doing so, we stress that it is not the purpose of Rule 15(c) "to raise a limitations bar that is not supported by the underlying state rule." 19 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 4509, at 159 (1982). On this basis two Ninth Circuit cases relied upon by Stone & Webster are distinguishable. In *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982), a case in which all the requirements of Rule 15(c) were met, including the requirement that the newly named defendant have notice of the institution of the action within the period of limitations, this court applied Rule 15(c) to save an action that would have been time-barred under state law. Thus

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[7] Two other circuits that have considered similar problems seem to be in conflict. In *Britt v. Arvanitis*, 590 F.2d 57 (3d Cir. 1978), the plaintiffs' action was held to be barred by Rule 15(c), despite a New Jersey Supreme Court decision (*Farrell v. Votator Div. of Chemetron Corp.*, 62 N.J. 111, 299 A.2d 394 (1973)) that the state statute governing amendments (which in its relevant part was identical to Rule 15(c)) permitted relation back of an amendment correcting a Doe designation. Characterizing the rule as "procedural," the Third Circuit held that the New Jersey rule must yield to the federal requirements for relation back under Rule 15(c). In *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974), the First Circuit held that the Massachusetts rule allowing relation back of amendments adding new parties is so dramatically different from the federal rule that the state rule should be the one applied in diversity cases. The fact that the state rule was "cast in procedural terms" did not deter the First Circuit from coming to this conclusion. *Id.* at 44. We find neither *Britt* nor *Marshall* to be particularly helpful in deciding the case before us because both involved state rules materially different from the California rules governing Doe procedure.

Rule 15(c) was not applied, as Stone & Webster would have us do in this case, to defeat an action that was not time-barred under state law. In *Craig v. United States*, 413 F.2d 854 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969), the court applied a federal statute of limitations that neither authorized the naming of Does nor provided plaintiff with extra time to discover the identity of unknown defendants.

Stone & Webster contends that *Hanna v. Plumer*, 380 U.S. 460, 470 (1965), compels application of Rule 15(c). In *Hanna*, the Supreme Court held that Rule 4(d)(1) of the Federal Rules of Civil Procedure, rather than state law, determined the adequacy of service of process. The Court explained that in the event of a "direct collision" between a federal rule and state law, the federal rule applies so long as it is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and constitutional. *Hanna*, 380 U.S. at 470-72. In *Hanna* itself, the "clash" between Rule 4(d)(1) and the state service requirement was "unavoidable". *Id.* at 470. As the Supreme Court said in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the first question is "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies." *Id.* at 749-50. As we have explained, in the case before us Rule 15(c) does not determine the timeliness of plaintiffs' action against Stone & Webster. Hence the asserted conflict between Rule 15(c) and state Doe practice is "bogus." 19 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 4509, at 158 (1982); *see also Rumberg*, 424 F. Supp. at 300 ("Nor does our holding conflict with [Rule] 15(c) of the Federal

Rules of Civil Procedure. The California statute of limitations scheme as applied in this case does not deal with the 'relation back' doctrine at all but rather extends or tolls the limitations period in the factual circumstances that exist in this case." (footnote omitted).

Finally, Stone & Webster argues that, even if California law applies, plaintiffs' claim is still time-barred because plaintiffs simply named Stone & Webster as a new defendant outright, rather than substituting it for a previously named fictitious defendant as required by Cal. Civ. Proc. Code § 474. Stone & Webster, arguing that strict compliance with section 474 is required, cites *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 683 (9th Cir. 1980), for the proposition that, "[u]nder California law, if a defendant is added to an amended complaint as a new defendant, and not as a Doe defendant, the amendment does not relate back to the time of the original complaint." First, we do not agree that strict compliance with section 474 is required. California's policy in favor of litigating cases on their merits requires that the fictitious name statute be liberally construed. *Barnes v. Williams*, 40 Cal.App.3d 199, 203, 114 Cal. Reptr. 839, 842 (1974). Second, it is clear that Stone & Webster was substituted for a previously named fictitious defendant. Unlike the situation in *Anderson*, where the original Doe defendants 1 to 50 were still retained and new defendants were added, plaintiffs here complied with the technical requirements of section 474 to the full extent possible under federal practice. They filed a second amended complaint naming Stone & Webster as a defendant, eliminated the Doe defendants as named parties, and stated in their "Amended Memorandum of Points and Authorities re Motion to Add Party Defend-

ants'' that the parties were added in lieu of the Doe designation. Federal procedure permitted plaintiffs to do no more. We thus reject Stone & Webster's contention that plaintiffs should be denied the three-year extension of the statute of limitations provided by California Doe rules for failing strictly to comply with section 474's requirement that the new defendant be named and served as a person sued under a fictitious name. *See Rumberg,* 424 F. Supp. at 298. Acceptance of Stone & Webster's argument would effectively preclude invocation of the three-year extension any time after removal of the action to federal court.

Stone & Webster's reliance on *Anderson* is misplaced for another reason. In that case, plaintiff's failure to substitute the new party for a Doe defendant occurred *before* removal, when state Doe procedures still applied. Thus plaintiff in that case could have complied with the requirements of section 474, but failed to do so. For that reason, *Anderson* is distinguishable. Once again, we agree with Judge Pregerson in *Rumberg* that the absence of a federal pleading mechanism comparable to section 474 should not deprive a plaintiff of the extension of the limitations period provided under California Doe practice. *Rumberg,* 424 F. Supp. at 298. A contrary rule would be a departure from *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and its progeny, particularly *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), because it would result in the abridgment of substantive rights under state statutes of limitations.

REVERSED and REMANDED.

APPENDIX B

DISTRICT COURT'S ORDER

Filed September 14, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-6195-WAI

DONALD LINDLEY; RITA LINDLEY,

Plaintiffs,

v.

GENERAL ELECTRIC CORPORATION; STONE & WEBSTER ENGINEERING CORPORATION; HOFFMAN CONSTRUCTION COMPANY OF CALIFORNIA INC.; W. BURNS HOFFMAN,

Defendants.

O R D E R

Defendant Stone & Webster Engineering Corporation's motion to dismiss came before the Court and was submitted without oral argument on August 8, 1983.

The Court concludes that the motion must be decided under Fed.R.Civ.P. 15(c). *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 740 (9th Cir. 1982), *Hanna v. Plumer*, 380 U.S. 460 (1965). Since plaintiff has not addressed the issues relating to the specific application of Rule 15(c) to this case, IT IS HEREBY ORDERED that plaintiff shall have until September 27, 1983 to submit a brief addressing only the issues of the manner in which Fed.R. Civ.P. is applicable to the amendment in question and whether or not the requirements of the rule are met.

Defendant shall have until October 4, 1983 to respond to plaintiff's brief, at which time the motion shall be deemed resubmitted.

DATED: 9-13-83.

/s/ William A. Ingram
United States District Judge

APPENDIX C

DISTRICT COURT'S ORDER

Filed January 19, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-83-6195-WAI

DONALD LINDLEY and RITA LINDLEY,

Plaintiffs,

v.

GENERAL ELECTRIC CORPORATION, et al.,

Defendants.

O R D E R

Defendant Stone & Webster Engineering Corporation's motion to dismiss came before the court and pursuant to the court's September 14, 1983, order, the parties were allowed additional opportunity to brief the issues of "the manner in which Fed. R. Civ. P. [15(c)] is applicable to the amendment in question and whether or not . . . the requirements of the rule are met."

Plaintiffs make no attempt to argue that the federal rule is inapplicable in light of state amendment of pleading rules which would allow a contrary result in this case. Plaintiffs' motion is futile in light of *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982) Indeed, this court's September 14, 1983, order made it clear that the court had concluded "that the motion must be decided under Fed. R. Civ. P. 15(c)."

Accordingly, defendant's motion is hereby GRANTED.

DATED: 1-19-84.

/s/ William A. Ingram
United States District Judge

APPENDIX D

DISTRICT COURT'S AMENDED ORDER

Filed January 23, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-6195-WAI

DONALD LINDLEY and RITA LINDLEY,

Plaintiffs,

v.

GENERAL ELECTRIC CORPORATION, et al.,

Defendants.

AMENDED ORDER

This court's order of January 19, 1984, should read as follows:

Defendant Stone & Webster Engineering Corporation's motion to dismiss came before the court and pursuant to the court's September 14, 1983, order, the parties were allowed additional opportunity to brief the issues of "the manner in which Fed. R. Civ. P. [15(c)] is applicable to the amendment in question and whether or not . . . the requirements of the rule are met."

Plaintiffs make no attempt to argue that the requirements of Fed. Rule Civ. P. 15(c) have been met. Instead plaintiffs argue that the federal rule is inapplicable in light of state amendment of pleading rules which would allow a contrary result in this case. Plaintiffs' position is futile in light of *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 740 (9th Cir. 1982). Indeed, this court's September

14, 1983, order made it clear that the court had concluded "that the motion must be decided under Fed. R. Civ. P. 15(c)."

Accordingly, defendant's motion is hereby GRANTED.

DATED: January 23, 1984

/s/ William A. Ingram
United States District Judge

(2)

No. 85-1479

Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

VS.

DONALD LINDLEY AND RITA LINDLEY,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 22, 1986

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12-1-P

QUESTION PRESENTED

Plaintiffs timely filed an action in state court naming fictitious parties under state law. The complaint was removed to federal court by the named defendant. Under state law, plaintiffs would be permitted to name defendants within three years of this initial filing, and those defendants are considered parties to the action from the time of commencement for the purposes of the statute of limitations. Rule 15(c), the federal rule concerning relation-back, permits an amendment changing the party against whom a claim is asserted if the added defendant had notice "within the period provided by law for commencing the action against him." Fed.R.Civ.P. 15(c). California courts have consistently held that plaintiffs have up to three years within which to "name" the fictitious party for the purposes of the statute of limitations if the state complaint names "DOE" parties and is filed within one year.

The Ninth Circuit found that Rule 15(c) would otherwise apply, but that the action was not time-barred under California's substantive statute of limitations. Since Rule 15(c) was designed to control amendments sought *after* the limitations period had expired, it did not apply here because under state law plaintiffs would have a substantive right to serve the fictitiously-named defendant within three years.

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No.

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OCTOBER TERM, 1985

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Donald Lindley and Rita Lindley, in response to petitioner's prayer for a writ of certiorari, oppose said petition and pray that said petition be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 797 (9th Cir. 1986). All references to that opinion will refer to its reproduction in Appendix A to the petition of Stone & Webster Engineering Corporation (hereinafter "Stone & Webster").

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT CONCLUDED THAT THE SCOPE OF RULE 15(c) WAS NOT AS BROAD AS URGED BY PETITIONER

A. Hanna v. Plumer supports the position taken by the Ninth Circuit

As this Court stated in *Hanna v. Plumer*, 380 U.S. 460 (1965),

> "It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforecement of state law." 380 U.S. at 470.

The Ninth Circuit, adopting the reasoning of Judge Pregerson in *Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294 (C.D.Cal. 1976), found that Rule 15(c) "did not come into play" because the plaintiff filed and served the amended complaint within the state limitations period.

> "As we have explained, in the case before us Rule 15(c) does not determine the timeliness of plaintiffs' action against Stone & Webster." (App. A at A8).

Since ther was no "clash" as existed in *Hanna v. Plumer*, it found that plaintiffs' complaint was not time-barred.

In sum, the Ninth Circuit concluded that the *scope* of Rule 15(c) was not as broad as urged by Petitioner herein, since it has nothing to do with the period of limitations for commencing an action against fictitious parties.

B. Walker v. Armco Steel Corp. Supports the Ninth Circuit's Decision

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the issue was whether state law or a federal rule should be followed in determining when an action is commenced for the purpose of tolling the statute of limitations. Under state law, the two-year statute of limitations did not begin to run until service of the summons on the defendant. However, if plaintiff filed the complaint within two years and then served the defendant within 60 days, the action was deemed commenced from the date of the filing, even though service occured outside of the limitations period.

If FRCP Rule 3 was followed with respect to the "commencement" of actions, plaintiff's action would be tolled. If the state rules regarding commencement of actions were followed, plaintiff's lawsuit would be foreclosed.

In applying *Hanna v. Plumer, Supra*, the Court stated that the "first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies." 446 U.S. at 749-750.

In *Walker* the above analysis was applied. The court noted that Federal Rule of Civil Procedure Rule 3 was not intended to toll a state statute of limitations, much less to "displace state tolling rules for purposes of state statutes of limitations." 446 U.S. at 750-751. Since the state service rule was "part and parcel" of the state limitations period, and Rule 3 was not intended to replace those state policy determinations, each rule controlled " its own intended sphere of coverage without conflict." 446 U.S. at 752.

In the case now before this court, clearly Rule 15(c) was not intended to create a state limitations period by its clear meaning. Thus, there is no conflict between it and state procedures regarding fictitious parties. Further, it should be noted that plaintiffs filed their complaint in *state* court and exercized their state right to name fictitious parties. In this situation, it is defendant's right to remove the entire action to Federal Court. If the substantive "DOE" procedures found in state law are not followed by Federal

courts in diversity cases, defendants would be encouraged to go forum shopping. Further, there would be inequitable administration of the laws since planitiffs would clearly have had the right to proceed against Stone & Webster in their selected forum. This would conflict with the "twin aims" of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which is discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Hanna v. Plumer, Supra,* 380 U.S. at 468.

II

UNDER STATE LAW THE DOE PROCEDURE IS A STATUTORY RIGHT AND IS AN INTEGRAL PART OF THE STATUTE OF LIMITATIONS.

Plaintiffs properly followed state law regarding naming of ficitious parties. Those procedures have been referred to as "identical" to the base period of limitations under state law:

> "The nature and purpose of Section 581a and the statute of limitations after all, are virtually identical". *Barrington v. A.H. Robins Co.*, 39 Cal.3d 146 at 152 (1985).

In *Olden v. Hatchell*, 154 Cal.App.3d 1032 (1984), the Court stated that a substituted party "is considered a party to the action from its commencement so that the statute of limitations stops running as of the date the original complaint was filed." (Citations omitted).

In *Barrows v. American Motors Corporation*, 144 Cal.App.3d 1 at 7, (1983), the Court stated as follows:

> " . . . a defendant sued by fictitious name and later brought in by amendment substituting his true name *is considered a party to the action from its commencement for the purposes of the statute of limitations.*" (Emphasis Added)

Indeed, the provisions in question have been referred to as a statutory "right". *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal.2d 596 at 602 (1961):

> "The right of a plaintiff to use a fictitious name where he is ignorant of the defendant's true name is one conferred by

> statute (Cod.Civ.Proc., Sec. 474), and it has long been recognized that the purpose of the provision is to enable such a plaintiff to bring suit before it is barred by the statute of limitations and that this procedure does not subject the defendant to undue hardship. (Citation omitted). . . . [the defendant] is considered a party to the action from its commencement for the purpose of the statute of limitations."

The *Austin* court went on to state that a plaintiff should not be penalized "merely because he was compelled to resort to his statutory right of using a fictitious name". 56 Cal.2d at 603.

As stated in *Munoz v. Purdy*, 91 Cal.App.3d 942, 946 (1979),

> "A plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, *and that time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant.*" [Emphasis Added].

With respect to Stone & Webster's argument that the state scheme is procedural, and not substantive, the Ninth Circuit pointed to *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), where the court stated:

> "It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State Court opinions in any use of those terms unrelated to the specific issue before us."

The only case that considered the state procedures in question with respect to the specific issues before this Court was *Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294 (C.D. Cal. 1976). In this case it was held that the state procedures are the functional equivalent of a limitations period of up to four years. This case has since been cited favorably by the California Court of Appeal in *Munoz v. Purdy, Supra*, 91 Cal.App.3d 942 at 946.

The Ninth Circuit correctly held that the state procedures are substantive. This time period determines the basis for applying Rule 15(c). In defense of its position, petitioner asserts that *Craig v. United States*, 413 F.2d 854 (9th Cir. 1965) is contrary to the instant Ninth Circuit decision. This assertion is erroneous. *Craig*

involved an *admiralty* suit, filed in federal court, and based upon federal law. The statute of limitations involved was a federal statute, and plaintiff sought to overcome this by utilizing state law rules. The case presented before this court is a diversity action where plaintiffs filed their complaint in state court based solely upon state law. To deny plaintiffs their substantive rights in this situation would be contrary to 28 U.S.C. Section 2072.

III

THE NINTH CIRCUIT'S APPLICATION OF RULE 15(c) DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

The diversity cases cited by petitioner in fact support the Ninth Circuit decision.

Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980) involved a wrongful death diversity case which was filed in federal court. Plaintiff did not have capacity to sue under North Carolina law and thus did not fall within the state limitations period. The federal court permitted the amendment under Rule 15(c), noting that the state procedure was "confined solely to technical procedural concerns in the prosecution of litigation." 615 F.2d at 612. Further, the court noted that there is a general policy embodied in the Federal Rules favoring resolution of cases on their merits, citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). 615 F.2d at 613. A similar rationale was followed in *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967).

Welch v. Louisiana Power & Light Company, 466 F.2d 1344 (5th Cir. 1972) involved an interpretation of Louisiana law which did not have a statutory scheme for fictitious parties similar to California's scheme. A similar situation existed in *Loudenslager v. Teeple*, 466 F.2d 249 (3d Cir. 1972) involving Pennsylvania law.

Britt v. Arvanitis, 590 F.2d at 57 (3d Cir. 1978) and *Williams v. Avis Transport of Canada, Ltd.*, 57 F.R.D. 53 (1972) both involved state law procedural schemes that were procedural, and not substantive. In fact, in *Williams* the court refused to rely on the California scheme which was cited by analogy, and instead

relied on the applicable Nevada law, holding that its two-year statute of limitations was not extended. *Accord*, *Simmons v. Fenton*, 480 F.2d 133 (7th Cir. 1973). *Royal Indemnity Co. v. Petrozzino*, 598 F.2d 816 (3d Cir. 1979) involved a situation where New Jersey's fictitious party procedure was not available to the plaintiff at the time the complaint was filed. The court cited *Britt v. Arvanitis*, *Supra*, which interpreted the New Jersey law pertaining to fictitious parties and concluded that it was precedural and did *not* extend the state limitations period.

In sum, each district interpreting those conflicts correctly applied the substantive law of the state to determine how to apply Rule 15(c). California's scheme is substantive, and to prevent plaintiffs from proceeding against Stone & Webster on the merits would be tantamount to defeating plaintiffs' state law rights. Indeed, plaintiffs timely filed their action is state court and followed state law regarding designation of fictitious parties. To apply *Hanna v. Plumer* to defeat those rights would be contrary to the federal policy of litigating cases on their merits.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the opinion of the Ninth Circuit Court of Appeals was in accordance with both state and federal authority and thus not appropriate for review by this Court.

Respectfully submitted,

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No. 85-1479

In The
Supreme Court of the United States
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STONE & WEBSTER ENGINEERING CORPORATION,
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DONALD LINDLEY and RITA LINDLEY,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

The Ninth Circuit's decision in this case is a serious threat to the uniformity of procedure in the federal courts that the Federal Rules of Civil Procedure were adopted to bring about. Specifically, it threatens to introduce into the federal courts the variations that exist from state to state in "Doe" procedures and other state relation back rules. The danger is broader than that, however; the Ninth Circuit's rationale is applicable to virtually any procedure that can be described as "effectively" altering the basic result that follows from any substantive statute. It is hard to imagine any procedural rule that could not qualify for that rationale. Plaintiffs do not address that very good reason for granting a writ of certiorari.

Instead, plaintiffs argue chiefly that *Hanna v. Plumer*, 380 U.S. 460 (1965) does not require application of Rule 15(c) in this case, and that *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) excuses its application, because "the *scope* of Rule 15(c)" is not broad enough to bring it into conflict with California "Doe" procedure. (Opp. at 2-3) Specifically, they say, "clearly Rule 15(c) was not intended to create a state limitations period by its clear meaning." (Opp. at 3) The difficulty with their argument is that Cal. Civ. Proc. Code sections 474 and 581a(a) do not "create a state limitations period" either. The "Doe" procedure is a relation back rule, just like Rule 15(c). As a result, *Hanna* governs this case and *Walker* does not, and the Ninth Circuit's decision is contrary to *Hanna* and the decisions of other circuits that have followed *Hanna*.

II. THE "SCOPE OF RULE 15(c)" IS THE SAME AS THAT OF THE CALIFORNIA "DOE" PROCEDURE; BOTH ARE RELATION BACK RULES.

Stone & Webster's Petition cited several decisions of the California Supreme Court and Court of Appeal explaining that the subject matter of the "Doe" procedure is relation back. (Pet. at 10-11) Plaintiffs themselves cite several more such cases. (Opp. at 4-5) In fact, they quote language from two of them that shows very clearly that the theory of the "Doe" procedure is one of relation back: a defendant substituted for a "Doe" previously listed in the complaint "is considered a party to the action from its commencement for the purposes of the statute of limitations." *Parrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 7, 192 Cal. Rptr. 380, 382 (1983) (quoted at Opp. at 4); *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 818, 364 P.2d 681, 682 (1961) (quoted at Opp. at 5).

That language is the exact description of the concept of relation back. And it cannot possibly be read as saying that the "Doe" procedure extends the limitations period. There would be no point in deeming a defendant substituted for a "Doe" to have been a party at the commencement of the lawsuit if the "Doe" procedure really extended the limitations period to encompass the time when he actually became a party by virtue of the substitution.

Literally dozens of California cases describe the "Doe" procedure in such relation back terms.* Plaintiffs refer to only one, *Munoz v. Furdy*, 91 Cal. App. 3d 942, 946, 154 Cal. Rptr. 472, 474 (1979), as saying that the time for naming a defendant "is extended" by the "Doe" procedure. Just a sentence later, however, the *Munoz* court explained what it really meant by the offhand characterization plaintiffs rely on:

> When the complaint is amended to substitute the true name of the defendant for the fictional name, *the defendant is regarded as a party from the commencement of the suit* . . . (emphasis added).

That is relation back again.

Contrary to all the California cases, including *Munoz*, the Ninth Circuit decided that the "Doe" procedure "does

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* E.g., *Marasco v. Wadsworth*, 21 Cal. 3d 82, 86, 145 Cal. Rptr. 843, 845, 578 P.2d 90, 92 (1978); *Smeltzley v. Nicholson Mfg. Co.*, 18 Cal. 3d 932, 935, 136 Cal. Rptr. 269, 271, 559 P.2d 624, 626 (1977); *Moseley v. Abrams*, 170 Cal. App. 3d 355, 360, 216 Cal. Rptr. 40, 43 (1985); *Kralow Co. v. Sully-Miller Contracting Co.*, 168 Cal. App. 3d 1029, 1035, 214 Cal. Rptr. 630, 634 (1985); *Olden v. Hatchell*, 154 Cal. App. 3d 1032, 1035, 201 Cal. Rptr. 715, 718 (1984); *Barrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 7, 192 Cal. Rptr. 380, 382 (1983); *ITT Gilfillan, Inc. v. City of Los Angeles*, 136 Cal. App. 3d 581, 587, 185 Cal. Rptr. 848, 851 (1982); *Schumacher v. Superior Court*, 94 Cal. App. 3d 187, 191, 156 Cal. Rptr. 286, 288 (1979); *Coronet Mfg. Co. v. Superior Court*, 90 Cal. App. 3d 342, 345, 153 Cal. Rptr. 366, 367 (1979); *Chase v. State of California*, 67 Cal. App. 3d 808, 811, 136 Cal. Rptr. 833, 834 (1977); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 873, 128 Cal. Rptr. 724, 731 (1976); *Jensen v. Royal Pools*, 48 Cal. App. 3d 717, 721, 121 Cal. Rptr. 805, 807 (1975); *Barnes v. Wilson*, 40 Cal. App. 3d 199, 203, 114 Cal. Rptr. 839, 842 (1974); *Warren v. Atchison, T. & S.F. Ry. Co.*, 19 Cal. App. 3d 24, 38, 96 Cal. Rptr. 317, 327 (1971); *Garrett v. Crown Coach Corp.*, 259 Cal. App. 2d 647, 649, 66 Cal. Rptr. 590, 592 (1968).

not deal with the 'relation back' doctrine at all but rather extends or tolls the limitations period." (App. A at A9) (quoting *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294, 300 (C.D. Cal. 1976)). Thus, ironically, the Ninth Circuit's purported deference to California law in this diversity case was based on completely disregarding what California had to say about its own laws and making up its own characterization. If a federal court is free to do that, and to displace federal rules with state procedures where it chooses to view them as "effectively" altering state substantive law results, the Federal Rules' goal of uniformity in procedure is in grave danger.

III. HANNA GOVERNS; WALKER DOES NOT.

Because the California "Doe" procedure and Rule 15(c) are both relation back rules, they are in "direct collision," *Hanna*, 380 U.S. at 472; in such a case *Hanna* provides the governing rule and *Walker* does not.

Walker's rule is that "*in the absence of a federal rule directly on point*, state service requirements *which are an integral part of the state statute of limitations* should control . . ." 446 U.S. at 752 (emphasis added). Here there is a rule directly on point on the subject of relation back, Rule 15(c). In addition, the "Doe" procedure for relation back is not an "integral part" of the California statute of limitations within *Walker's* meaning.

In *Walker* the state statute in question was a definition of what the statute of limitations meant by commencement of an action. The content of the limitations statute was inseparable from that definition; to disregard the definition was to change the statute of limitations itself.

But not every state provision related in some manner to a statute of limitations is such an "integral" part of it. *Hanna* also involved a statute of limitations. *See* 380 U.S. at 462 and n. 1. In fact, the Massachusetts requirement for in-hand service on an executor was part of *the same sentence* that stated the limitations period. *Ibid.* Yet *Hanna* held that the procedural manner-of-service aspect of the statute should be distinguished from its limitations aspect. *Ibid.* Though literally a part of the limitations statute, the in-hand service requirement was not an "integral" part, inseparable from the meaning of the limitations period as was the definitional statute in *Walker.*

Relation back rules like the California "Doe" procedure are undoubtedly related to the statute of limitations. But that does not make them "integral parts" of the limitations statutes. That is shown by the fact that they also have other functions unrelated to limitations. In California, the substitution of a named defendant for a "Doe" relates back for all purposes, not just for the purpose of the statute of limitations. For example, though the three-year period to serve summons under Cal. Civ. Proc. Code § 581a(a) normally starts to run when a party is first named, e.g., by amendment, it runs from the commencement of the action as to a party substituted for a "Doe", because the substitution relates back to that time. *Barrington v. A.H. Robins, Co.*, 39 Cal. 3d 146, 152-54, 216 Cal. Rptr. 405, 408-409, 702 P.2d 563, 566-67 (1985). Similarly, though the normal rule on a motion for change of venue is that residence for purposes of venue is to be determined by the pleadings as of the time when the motion is filed, the court must nevertheless consider the residence of a party who is substituted for a "Doe" between the filing of the

motion and the hearing, because the substitution relates back to a time before the motion was brought. *Gutierrez v. Superior Court*, 243 Cal. App. 2d 710, 724-25, 52 Cal. Rptr. 592, 602 (1966). It is impossible to explain how an "integral" part of the statute of limitations could operate in those ways outside of the limitations context.

Because there is a federal rule directly on point, and because the California "Doe" procedure is not an integral part of the statute of limitations, *Walker* does not govern this case. *Hanna* does, and it commands application of Rule 15(c).*

IV. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In its Petition, Stone & Webster cited a number of federal court cases applying Rule 15(c) under *Hanna* in a way in conflict with the Ninth Circuit's decision. (Pet. at 13-14) Plaintiffs' purported distinctions of those cases (Opp. at 6-7) fail to see the forest for the trees. Certainly the state rules involved in those cases differed in various respects from California's "Doe" procedure, as plaintiffs point out. But all of the state rules involved dealt with

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* Plaintiffs' observation that they filed their complaint in state court (Opp. at 3) does not give them a right to application of state procedures. The same thing could be said of any state procedure in any removed action.

Plaintiffs' suggestion that application of Rule 15(c) will encourage defendants to forum shop (Opp. at 4) is ridiculous. Could the defendants who removed this action before Stone & Webster was added possibly have been influenced in the slightest way by the chance that removal might make it more difficult for plaintiffs to maintain their action against additional defendants such as Stone & Webster, added after removal? Surely not.

relation back. And all of the cases concluded that Rule 15(c), not the state relation back rule, governed that subject. All of them conflict with the Ninth Circuit's notion that relation back rules should be regarded as integral parts of the statute of limitations because they can be characterized as "effectively extending" the limitations period.

In particular, plaintiffs' attempt to distinguish the cases Stone & Webster cited on the ground that they involved "procedural" rules is both wrong and irrelevant. It is wrong because it depends on the same false notion that California's "Doe" procedure is "substantive" because it can be viewed as "effectively extending" the limitations period. It is irrelevant because, under *Hanna,* the only significance of classifying a matter as "procedural" is to deem it a permissible subject for a rule under the Rules Enabling Act, 28 U.S.C. § 2072, forbidding modification of any substantive right by rule, and under the Constitutional provision for a federal court system. *See Hanna,* 380 U.S. at 463-64, 471-72. But the adoption of Rule 15(c) evidences the judgment of the Advisory Committee, this Court, and Congress that relation back is a proper subject of a federal rule under those provisions. *Hanna,* 380 U.S. at 471. Not even plaintiffs question Rule 15(c)'s validity. And the Ninth Circuit has concluded that Rule 15(c) does not transgress either the Rules Enabling Act's proscription or the Constitution. *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 740 (9th Cir. 1982).

Hanna commands the federal courts to apply a valid federal rule in diversity cases. Other circuits have obeyed that directive. The Ninth Circuit has not, and its decision is contrary to those decisions.

CONCLUSION

The Court should review this case to settle the conflict between the Ninth Circuit's decision in this case, on one hand, and on the other, *Hanna* and the lower federal court cases that have correctly applied it in the context of Rule 15(c). It should also review it because the Ninth Circuit's decision poses a serious threat to the Federal Rules' goal of uniform procedure, both because of its result and because of its rationale. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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